

IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
WILLOW CREEK BASIN (41N)
PRELIMINARY DECREE

CLAIMANTS: Gary A. Wolfe; Harry L. Wolfe

CASE: 41N-0282-R-2022
41N 155699-00
41N 155703-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

All water right claims that appeared in the Preliminary Decree for Willow Creek (Basin 41N) were subject to "issue remarks" resulting from pre-decree examination by

the DNRC, objections, and counterobjections.

Claims 41N 155699-00 and 41N 155703-00 were consolidated into Case 41N-0282-R-2022 to resolve the issue remarks.

FINDINGS OF FACT

1. Claim 41N 155703-00 received the following substantive issue remark:
PRIORITY DATE MAY BE QUESTIONABLE. THE SOURCE DESCRIBED ON THE FIELD NOTICE OF APPROPRIATION IS INCONSISTENT WITH THE CLAIMED SOURCE.
2. On June 14, 2022, the Court consolidated the claims and ordered the Claimant to file information or evidence resolving the issue remark.
3. On July 25, 2022, Claimants Gary A. Wolfe and Harry L. Wolfe filed a *Response* to the Water Court addressing the above-listed issue remark.
4. On November 30, 2022, the Court Ordered Claimants Gary A. Wolfe and Harry L. Wolfe to work with the DNRC, under §85-2-248(5), MCA, to more fully resolve the issue remark appearing on claim 41N 155703-00.
5. On February 27, 2023, DNRC Water Resources Specialist Dixie Brough filed a *Memorandum* in this matter. The *Memo* states that the DNRC was contacted by Claimant Gary A. Wolfe on December 22, 2022. Ms. Brough's *Memo* states that after reviewing the claim file and aerial maps, the DNRC concluded Antelope Coulee was printed on the 1943 topographical map bearing the same name, however, on the 1986 topographical map Antelope Coulee SW, the source of water at the point of diversion is Willow Creek, West Fork. Based on that information the DNRC recommends that the issue is resolved, and the issue remark be removed.
4. Claim 41N 155699-00 received a notice-type issue remark from the DNRC during its claims reexamination. No Objections were filed.

PRINCIPLES OF LAW

1. A properly filed Statement of Claim for an existing water right is prima facie proof of its content. Section 85-2-227, MCA; Rule 10, W.R.Adj.R.

2. Prima facie proof may be contradicted and overcome by a preponderance of the evidence. Rule 19, W.R.Adj.R.

3. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

4. If prima facie status is overcome, the burden shifts back to the claimant to demonstrate historical use. *79 Ranch v. Pitsch*, 204 Mont. 426, 432-33, 666 P.2d 215, 218 (1983).

5. Section 85-2-248(2), MCA, requires that the Water Court resolve all issue remarks that are not resolved through the objection process. *See also* Rule 7, W.R.Adj.R.

6. The Water Court may use information submitted by the DNRC, the Statement of Claim, and any other data obtained by the Court to evaluate a water right. Sections 85-2-227, -231(2), MCA.

7. When resolving issue remarks, the Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA. The factual evidence on which an issue remark is based must meet the preponderance of evidence standard before the prima facie status of a claim is overcome. 43Q 200996-00 et al., Order Establishing Volume and Order Closing Case, at 18, June 8, 2015.

8. If a claimant fails to comply with an order issued by the Water Court, the Court may issue orders of sanction that are just. Rule 22, W.R.Adj.R.

CONCLUSIONS OF LAW

1. The information in the record is sufficient to resolve the above-listed issue remark appearing on claim 41N 155703-00. Based on the information contained Ms. Brough’s *Memo*, the source element should remain as it appears on the abstract. The issue remark should be removed from claim 41N 155703-00.

2. The notice-type issue remark appearing on the claim 41N 155699-00 served its notice purpose and should be removed from the claim.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, this Master recommends that the Court adopt the changes as outlined above.

Post decree abstracts of the water right claims reflecting the recommended changes are attached to this Report.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Gary A. Wolfe
P.O. Box 851
Shelby, MT 59474-0851

Harry L. Wolfe
P.O. Box 758
Shelby, MT 59474-0758

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N

Water Right Number: 41N 155699-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: GARY A WOLFE
PO BOX 851
SHELBY, MT 59474 0851

HARRY L WOLFE
PO BOX 758
SHELBY, MT 59474 0758

Priority Date: DECEMBER 31, 1920

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: UNNAMED TRIBUTARY OF WEST FORK WILLOW CREEK

Source Type: SURFACE WATER

NATURAL SINK

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSWNE	32	33N	1W	TOOLE

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: PIT

Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSWNE	32	33N	1W	TOOLE

Diversion to Reservoir: DIVERSION # 1

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSWNE	32	33N	1W	TOOLE
2			NWNWSE	32	33N	1W	TOOLE

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
WILLOW CREEK
BASIN 41N**

Water Right Number: 41N 155703-00 STATEMENT OF CLAIM
Version: 4 -- POST DECREE
Status: ACTIVE

Owners: GARY A WOLFE
PO BOX 851
SHELBY, MT 59474 0851

HARRY L WOLFE
PO BOX 758
SHELBY, MT 59474 0758

Priority Date: NOVEMBER 10, 1922
Type of Historical Right: FILED
Purpose (use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED FOR THIS USE FROM THIS ONSTREAM RESERVOIR. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: WEST FORK WILLOW CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSESE	26	33N	1W	TOOLE

***Period of Diversion:** JANUARY 1 TO DECEMBER 31
Diversion Means: DAM
Reservoir: ONSTREAM

<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
	SWSESE	26	33N	1W	TOOLE

Diversion to Reservoir: DIVERSION # 1

Period of Use: APRIL 1 TO OCTOBER 1
Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSESE	26	33N	1W	TOOLE
2			SESESE	26	33N	1W	TOOLE